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Supreme Court, U.S.
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No. 04-451

In the Supreme Court of the United States

MILBURN DEARING, *ET AL.*,
Petitioners,
v.

TEXAS PARKS AND WILDLIFE DEPARTMENT, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Texas Commission on Human Rights Act ("TCHRA"), to "determine the availability of . . . a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments (29 U.S.C. Section 621 *et seq.*)." TEX. LAB. CODE §21.122(b). As a matter of Texas law, absent existing precedent from this Court addressing whether the ADEA recognizes a disparate-impact cause of action, does a court satisfy the above provision of the TCHRA by applying the judicial interpretation of the ADEA prevailing among the federal courts of appeals at that time?

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Respondents, the Texas Parks and Wildlife Department, *et al.* ("the Department"), respectfully file this brief in opposition to the petition for writ of certiorari filed on behalf of Petitioners, Milburn Dearing, *et al.*

Argument

I. THE QUESTION PRESENTED IS A NARROW ISSUE OF TEXAS LAW, NOT THE BROAD QUESTION OF FEDERAL LAW DESCRIBED BY PETITIONERS.

Petitioners inaccurately describe "the question presented by this case" as one of federal law: "whether the Age Discrimination in Employment Act provides a remedy for disparate impact age discrimination." Pet., at 4. That federal question presumably will be decided by the Court's decision in *Smith v. City of Jackson*, 351 F.3d 183 (CA5 2003), *cert. granted*, 124 S.Ct. 1724 (Mar. 29, 2004). In the instant case, Petitioners raised only state-law claims under the Texas Commission on Human Rights Act ("TCHRA"), not any federal claims under the ADEA. Petitioners also describe the question presented as whether the TCHRA recognizes a disparate-impact cause of action for age discrimination claims. Pet., at *i*. That description is closer to the mark, but the real question presented involves an even narrower issue of Texas law.

The TCHRA unequivocally requires Texas courts to look to the federal "judicial interpretation" of the ADEA to determine the availability of a disparate-impact claim for age discrimination. *See* TEX. LAB. CODE §21.122(b). It is undisputed that, at the time of the court of appeals's decision, a majority of federal courts of appeals addressing the issue declined to recognize disparate-impact claims under the ADEA. Thus, the question presented is whether the court of appeals's decision below—which complied with the TCHRA's mandate to follow the prevailing majority of federal appeals courts declining to recognize disparate-impact claims under the ADEA—would become retrospectively "wrong" under the TCHRA in the event that this Court reverses *Smith* and adopts the position representing the minority rule among the federal courts of appeals.

Because this is a pure question of Texas law—and one that the Texas Supreme Court has answered in the negative by denying Petitioners' motion to stay the case pending the outcome of *Smith*—the Court lacks jurisdiction of the case as well as any sound reason to consider it.

II. THE COURT LACKS JURISDICTION BECAUSE THE COURT OF APPEALS'S DECISION INVOLVES ONLY AN ISSUE OF TEXAS LAW THAT IS NOT SUBJECT TO CERTIORARI REVIEW.

A. The Court's Decision to Address Federal Issues of Age Discrimination in *Smith v. City of Jackson* Does Not Transform the State-Law Claims in This Case into Federal Claims.

Invoking *Smith*, Petitioners seek to circumvent the jurisdictional defect in this case by packaging the state-law question presented as one of federal law. But this case involves no claims under the ADEA and will resolve no issues of federal law. Petitioners acknowledge that they "filed suit below for age discrimination under the [TCHRA], a statute that . . . contemplates a claim for disparate impact discrimination to the extent supported by federal law under the [ADEA]." Pet., at 3. Because this case involves only state-law claims under the TCHRA, Petitioners' invocation of *Smith* fails to create certiorari jurisdiction where none otherwise exists.

Petitioners incorrectly assert that the Court has jurisdiction under 28 U.S.C. §1257(a). Pet., at 1. That statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. §1257(a).

This case implicates none of the jurisdictional bases identified in §1257(a). In concluding that Petitioners had no disparate-impact cause of action under the TCHRA, the court of appeals did not question the validity of a federal treaty or statute. It did not adjudicate any challenge to the validity of the ADEA or address any claim that the Texas statute is "repugnant to the Constitution, treaties, or laws of the United States." *Id.*; *cf., e.g., United Air Lines v. Mahin*, 410 U.S. 623 (1973) (reviewing Illinois Supreme Court decision upholding application of state use tax to airplane fuel for consumption in interstate flight, where half of Illinois justices in majority voted to uphold tax based on belief that prior interpretation of state tax rule violated federal Interstate Commerce Clause); *State Tax Comm'n v. Van Cott*, 306 U.S. 511 (1939) (reviewing Utah Supreme Court decision exempting government wages from state income tax, where Utah court concluded that exemption was compelled by federal Constitution). In sum, §1257(a) does not provide jurisdiction of a case decided by a Texas court involving Texas plaintiffs bringing claims under Texas law.

This Court's "only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights." *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *Fay v. Noia*, 372 U.S. 391, 430 n.40 (1963) (same). The court of appeals in this case adjudged no federal rights possessed by Petitioners because Petitioners raised no federal claims, either statutory or constitutional. Moreover, "[the Court's] power is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S., at 126. Thus, even if the Court were to reverse *Smith* and make the court of appeals's survey of federal law retrospectively incomplete, it would

have no authority to reverse the court of appeals's judgment that is based on its interpretation of a Texas statute.

B. As a Matter of Texas Law, This Court's Treatment of *Smith* Will Not Retrospectively Affect the Texas Court of Appeals's Evaluation of the Judicial Interpretation of the ADEA Prevailing at the Time of Its Decision.

Petitioners claim that "if the Fifth Circuit decided *Smith* wrongly, then this case has likewise been wrongly decided." Pet., at 6. This simplistic analysis rewrites the duty placed on Texas courts by the TCHRA and overlooks critical distinctions between state and federal law. Even if the Court were to reverse *Smith* and recognize a "disparate impact" cause of action under the ADEA—a theory the viability of which the Court has doubted[1]—that change in federal law would not retrospectively make the court of appeals's judgment erroneous as a matter of state law. This is because the TCHRA requires courts to follow the federal judicial interpretation of the ADEA then prevailing, not to predict subsequent changes to that interpretation imposed by the Court's future decisions. *See* TEX. LAB. CODE §21.122(b); *Tex. Parks & Wildlife Dep't v. Dearing*, No. 03-03-0031-CV, 2004 WL 35543, at *7 (Tex. App.—Austin Jan. 8, 2004, pet. den.) ("Because the [TCHRA] directs us to follow judicial interpretation of the ADEA in determining the availability of a state disparate-impact theory, we must review this debate between the federal courts of appeals.").

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1. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("[W]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."); *see also id.*, at 618 ("[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.") (Kennedy, J., concurring).

1. The TCHRA requires courts only to follow the prevailing judicial interpretation of the ADEA applied by the federal courts.

The TCHRA's structure reflects the intent of the Texas Legislature to treat age-discrimination claims differently than other workplace discrimination claims. Subsection (a) of the TCHRA specifically authorizes claims of "a disparate impact on the basis of race, color, sex, national origin, religion, or disability." TEX. LAB. CODE §21.122(a)(1). However, subsection (a) "glaringly omits employment practices based on age discrimination." *Dearing*, 2004 WL 35543, at *8. Those practices are separately addressed in subsection (b), which provides: "To determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the [ADEA]." TEX. LAB. CODE §21.122(b).

Subsection (b) of the TCHRA thus "hinges the availability of a disparate-impact cause of action on judicial interpretation of the analogous federal act, the ADEA." 2004 WL 35543, at *8; *see* TEX. LAB. CODE §21.122(b). This provision requires courts to ascertain the contemporary view of the federal judiciary as to whether the ADEA allows disparate-impact claims. It does not require courts to abstain from deciding TCHRA cases pending the possibility of subsequent changes in the federal judiciary's view.

2. The court of appeals correctly recognized that the prevailing federal judicial interpretation declines to recognize disparate-impact claims under the ADEA.

The court of appeals reversed the trial court's order certifying Petitioners' TCHRA class after recognizing that the Fifth Circuit's recent decision in *Smith* created a five-to-three majority of federal appeals courts "concluding that a disparate-impact theory of liability is not actionable under the ADEA." 2004 WL 35543, at

*9.[2] The court began its analysis by noting that the First, Fifth, Seventh, Tenth, and Eleventh Circuits have squarely held that such claims are not cognizable under the ADEA;[3] that the Third and Sixth Circuits have made statements to the same effect;[4] and that only the Second, Eighth, and Ninth Circuits have recognized a disparate-impact theory under the ADEA.[5] Recognizing "that the overwhelming majority of 'judicial interpretation' of the ADEA is in accord with the decision reached in *Smith*," *id.*, at *11 n.7, the court of appeals followed *Smith* and held that "there is no disparate-impact theory of liability under the [TCHRA]." *Id.*, at *11. By obeying the TCHRA's command to follow the federal judicial interpretation of the ADEA prevailing at that time, the court of appeals satisfied the requirements of the Texas statute.

Petitioners will likely argue that the court of appeals followed *Smith* not solely because *Smith* represented the clear majority view

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2. Petitioners acknowledge that *Smith* established the same five-to-three majority identified by the court of appeals. Pet., at 5-6.

3. 2004 WL 35543, at *8-9 (citing *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (CA1 1999), *cert. denied*, 528 U.S. 811 (1999); *Smith*, 351 F.3d at 196; *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-77 (CA7 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (CA10 1996); and *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1325-26 (CA11 2001)).

4. *See id.*, at *8 (citing *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135,139 n.5 (CA6 1995), and *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (CA3 1995)).

5. *See id.*, at *9 (citing *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (CA2 1997); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (CA8 1997); and *EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 n.1 (CA9 1993)).

among the federal appeals courts, but also because the court of appeals embraced *Smith*'s reasoning. While the court of appeals did express its view that the majority position represented by *Smith* is better reasoned than the minority position, *see id.*, at *9-11—a view the Department fully supports but believes is unnecessary to the duty contemplated by the TCHRA of identifying the prevailing federal judicial interpretation—the court of appeals's *reason* for following the majority view is irrelevant under Texas law as to whether its judgment was correct. *See, e.g.*, *Hardy v. State*, 102 S.W.3d 123, 125 (Tex. 2003) ("Although we do not agree in all respects with the court of appeals' reasoning, we affirm its judgment."); *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002). In other words, even if the court of appeals had mistakenly believed that the TCHRA allowed it to freely choose either the majority or minority position among the federal circuit courts—an interpretation not suggested by either the TCHRA's language of the text of the court's opinion below—its decision to follow the "overwhelming majority" rule made its judgment correct under Texas law regardless of the reasoning used to arrive at that result. 2004 WL 35543, at *11 n.7.

Because the TCHRA requires courts to assess the existing judicial interpretation of the ADEA rather than predict future changes thereto, the propriety of the court of appeals's decision as a matter of Texas law does not turn on this Court's future treatment of *Smith*. A decision reversing *Smith* would not retrospectively render erroneous the court of appeals's conclusion that the prevailing federal judicial interpretation of the ADEA—as reflected by the clear majority of federal appellate-courts decisions as of January 8, 2004—precluded recognizing "disparate impact" claims of age discrimination under the TCHRA. Conversely, in the absence of binding precedent from this Court, even if a Texas court believed that this Court would likely depart from the existing judicial interpretation of the ADEA as reflected by a majority of the

federal appeals courts, the Texas court would contravene the TCHRA's mandate if it declined to follow that prevailing interpretation. Petitioners' claim that the Court's treatment of *Smith* dictates the outcome of this case reflects Petitioners' desires, not Texas law.

3. The Texas Supreme Court has already rejected Petitioners' argument as a matter of Texas law.

Significantly, Texas's highest civil court has indicated that, as a matter of Texas law, the court of appeals properly determined the prevailing "judicial interpretation" of the ADEA and that this Court's treatment of *Smith* would not affect the propriety of that conclusion. On March 15, 2004, Petitioners filed in the Texas Supreme Court their petition for review of the court of appeals's decision. On March 29, this Court granted the petition for writ of certiorari in *Smith*. No. 03-1160, Order Granting Pet. for Writ of Certiorari, 124 S.Ct. 1724 (Mar. 29, 2004). On April 6, Petitioners moved the Texas Supreme Court to stay this case pending the outcome of *Smith*. Mot. for Stay Pending U.S. Supreme Court Decision in *Smith v. Jackson*, at 1-4 (Apr. 6, 2004). After requesting and receiving the Department's response to that motion, the Texas Supreme Court denied the motion to stay on April 23, 2004. On July 2, 2004, the Texas Supreme Court denied the petition for review.[6] By declining to either review the court of appeals's decision or stay the appeal pending the outcome of *Smith*, Texas's highest civil court has indicated that the TCHRA requires courts to follow only the prevailing "judicial interpretation" of the ADEA in existence at the time of the court's ruling.

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6. Petitioners filed a second petition for review on March 21, 2004. That petition was also denied by the Texas Supreme Court on July 2, 2004.

Petitioners' assertion that "[t]he Fifth Circuit and, by extension, the Texas Supreme Court and Third Court of Appeals, were wrong" to embrace the majority rule, Pet., at 9, seeks to blur the crucial distinction between the role of the federal judiciary in determining federal law and the role of Texas courts in determining Texas law. As discussed above, the TCHRA instructs courts to apply the federal judicial interpretation of the ADEA prevailing at that time. *See* TEX. LAB. CODE §21.122(b). Any change in the existing judicial interpretation subsequently mandated by this Court would function like a statutory amendment effective as to future cases: it would render the court of appeals's decision in this case effectively obsolete without changing the result that the court of appeals's decision was correct under the case law in existence at that time. Thus, while courts applying the TCHRA in future cases would presumably recognize any changes that this Court's treatment of *Smith* would bring to the prevailing judicial interpretation of the ADEA, the TCHRA does not require courts to refrain from deciding cases when the Court has not yet spoken on the ADEA issue. Petitioners' contrary position reads into the TCHRA a requirement of uncertainty and delay that the statute's text does not support.[7]

The heart of Petitioners' complaint is their disagreement with two Texas courts' interpretations of a Texas statute, not federal law. The court of appeals undisputedly recognized and followed the majority judicial interpretation of the ADEA among the federal courts of appeals. By declining to stay the case or grant the petition for review following this Court's grant of certiorari in *Smith*, the Texas Supreme Court has effectively rejected Petitioners' claim that

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7. Given that the Court granted certiorari in *Smith* almost three months after the court of appeals issued its decision in this case, the court of appeals could not have known—and was not required to predict—that the Court would grant certiorari in *Smith* to resolve the federal ADEA question.

the correctness of the court of appeals's evaluation of the "judicial interpretation" of the ADEA will remain uncertain until this Court resolves *Smith*. Thus, Petitioners' complaint is essentially that the Texas Supreme Court misinterpreted the TCHRA by reading "judicial interpretation" to mean the existing federal judicial interpretation at the time of the decision. TEX. LAB. CODE §21.122(b).

Petitioners' argument that the propriety of the court of appeals's decision depends on *Smith* presumes a contrary interpretation of the TCHRA that is not supported by the statute's language. *See id.* The more significant point, however, is that Petitioners' premise challenges an interpretation of Texas law applied by the Texas Supreme Court—an issue this Court generally lacks jurisdiction to address. *See City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (Court has "no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that "state courts are the ultimate expositors of state law" and that "we are bound by their constructions except in extreme circumstances"); *United States v. Escalante*, 239 F.3d 678, 680 n.6 (CA5 2001) ("As state courts are the ultimate authority on issues of state law, federal courts are bound by their interpretations of state law."). The Court does not have jurisdiction of—and should not invest its judicial resources in—the question of whether a Texas court correctly interpreted a Texas statute.

C. It Is Clear That the Court of Appeals's Decision Rests Upon an Adequate and Independent State Ground, Because Petitioners Raised No Federal Claims Below.

1. The TCHRA's reference to federal law does not create a federal question over which this Court has jurisdiction.

Although Petitioners do not explain why this Court would have jurisdiction over a Texas court's decision regarding the interpretation of a Texas statute, they might argue—in error—that dicta from this Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), supports their claim of jurisdiction under 28 U.S.C. §1257(a). In *Merrell Dow*, plaintiffs sued a manufacturer of Bendectin in Ohio state court, claiming that the drug had been misbranded in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). *See id.*, at 805. The defendant removed to federal court based on federal-question jurisdiction, but the Sixth Circuit found such jurisdiction lacking and reversed. *See id.*, at 806-07.

The parties agreed, and the Court assumed, that the FDCA itself did not provide a private cause of action. *See id.*, at 810. However, the plaintiffs argued that the distribution of a drug in violation of FDCA standards constituted common-law negligence under Ohio law. *See id.*, at 806. This Court described the situation as the "presence of a federal issue in a state-created cause of action." *Id.*, at 810. It held that the case did not present a federal question for purposes of jurisdiction under 28 U.S.C. §1331, but it nonetheless recognized its own jurisdiction to review the Sixth Circuit's decision, stating: "Even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action." 478 U.S., at 816 (citing *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214-15 (1934)). The Court's exercise of jurisdiction in *Merrell Dow*, however, does not establish jurisdiction in this case.

This case is easily distinguished from *Merrell Dow*. In *Merrell Dow*, the Court unquestionably had jurisdiction to review the

decision of a federal court of appeals on a question of federal law: whether the incorporation of a federal statutory standard into state law gives rise to federal question jurisdiction under §1331. 478 U.S., at 805. By contrast, this case concerns only a Texas court's ruling on Texas law that involves no federal claims and implicates no federal rights.

Moreover, the Court's statement in *dicta* that it "retains power to review the decision of a federal issue in a state cause of action," 478 U.S., at 816, should be understood to apply only to state-court decisions that substantively interpret federal law. This conclusion is evidenced by the Court's citation to the following proposition as support for the above statement: "Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court . . . ." *See id.*, at 816 n.14 (quoting *Moore*, 291 U.S., at 214-15). The Court did not suggest that it would have certiorari jurisdiction over a state-court decision involving a state law that merely reflects the prevailing federal judicial interpretation of federal law and does not require the state court to independently undertake its own substantive interpretation of federal law.

As one observer summarized the issue:

> "[I]n all cases where the state incorporates federal law in an area in which it is not already operative—such as where it adopts the Federal Rules of Civil Procedure to govern state practice, or where it imposes the requirements of the Fair Labor Standards Act on local industries whose activity has no effect on interstate commerce—state determinations should be conclusive. The fact that review has rarely been sought in such cases is indicative of the general acceptance of this proposition." Note, *Supreme Court Review of State*

Interpretations of Federal Law Incorporated by Reference, 66 Harv. L. Rev. 1498, 1503-04 (1953).

Unlike the TCHRA, the ADEA is not operative against any State, in either federal or state court. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000). Accordingly, the Texas Supreme Court's conclusion—that the validity of the court of appeals's judgment as a matter of Texas law does not depend upon the outcome of *Smith*—should be conclusive.

The Court lacks jurisdiction of this case because the TCHRA does not require courts to construe the ADEA or otherwise decide any federal issues. Instead, as discussed above, the court of appeals fulfilled the TCHRA's mandate and rendered a correct judgment under Texas law simply by following the prevailing federal judicial interpretation of the ADEA. Nothing in *Merrell Dow* suggests that the Court has jurisdiction to review a state court's decision regarding a state statute that does not contemplate any substantive determination of federal law but instead merely directs the state court to follow the prevailing judicial interpretation of federal law.

2. The court of appeals's reading of the TCHRA constitutes an adequate and independent state ground.

The Court has long held that it will not review state-court judgments that rest upon adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983); *Zacchini*, 433 U.S., at 566. The Court's discussion of this point in *Long* makes clear that its jurisdiction is generally absent where the state court's decision involved solely state-law issues, as in this case.

First, the Court in *Long* noted that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and

adequate to support the judgment." 463 U.S. at 1039 n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). Second, the Court observed that it "may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied." *Id.* (citing *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967). Third, if "the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did,' then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction." *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)) (quoting, in turn, *Zacchini*, 433 U.S. at 568). Finally, "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Id.* (quoting *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

None of the above examples suggest the presence of jurisdiction in this case, where the decision of the state court below involved only state-law claims and there are no federal grounds on which the state court could have resolved the issue. As discussed above, the court of appeals's judgment was correct as a matter of Texas law regardless of the Court's future treatment of *Smith*, as confirmed by the Texas Supreme Court's refusal to stay the case pending *Smith*'s outcome. Accordingly, that judgment rests on an adequate and independent state ground that will remain undisturbed even if the Court disagrees with the majority rule as stated in *Smith* and followed by the court of appeals. *Cf. City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 292 (1982) ("If the Texas Constitution provides an independent ground for the Court of Appeals's judgment, our possible disagreement with its exposition of federal law would not provide a sufficient basis for reversing its judgment.").

III. THE CASE WOULD NOT WARRANT CERTIORARI REVIEW EVEN IF JURISDICTION EXISTED.

The Court's resolution of *Smith* presumably will resolve the federal ADEA issue for every federal court nationwide and for federal age-discrimination litigants in every jurisdiction. By contrast, the court of appeals's decision in this case resolves a state-law question that affects only Texas. Indeed, Petitioners recognize that granting certiorari review would merely "preserve the rights and claims of hundreds of class members" for claims brought in Texas state court under a Texas statute. Pet., at 9. That is hardly the type of "compelling reason[]" required to grant a petition for writ of certiorari. SUP. CT. R. 10.

Conclusion

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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